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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 131.

MARY G. HUSSEY, APPELLANT,

vs.

JOB SMITH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED AUGUST 3, 1876.

Smith's motion 19

SUPREME COURT OF THE UNITED STATES.

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1 Territory of Utah, supreme court.

Be it remembered that at a term of the supreme court within and for the Territory of Utah, begun and held at the court house in Salt Lake City, in the county of Salt Lake and Territory of Utah, on the sixth day of October, A. D. 1873:

Present, the honorable James B. McKean, chief justice; Jacob L. Boreman, associate justice; Philip H. Emerson, associate justice.

Among the records and proceedings of said court are the following:

On the 4th day of October, A. D. 1873, came Mary G. Hussey, by Snow and Hoge, her solicitors and counsel, and filed in the clerk's office of this court a transcript on appeal from the district court of the third judicial district in a case wherein the said Mary G. Hussey was appellant and Job Smith was appellee, which said transcript was in the words and figures following, viz:

TERRITORY OF UTAH,
Third Judicial District, County of Salt Lake, ss:

2 Be it remembered that at a court began and held in and for said district and Territory, at the city of Salt Lake, county of Salt Lake, at the March term thereof, for the year 1873, the following proceedings were had, to wit:

MARY G. HUSSEY, PLAINTIFF,
vs.
JOB SMITH, DEFENDANT.

On the 5th day of September, A. D. 1872, the said Mary G. Hussey, by her attorneys, Snow & Hoge, came and filed a transcript of the records and proceedings in the probate court, in a cause wherein Mary G. Hussey appealed to this court, in a case determined in said probate court; which transcript is in the words and figures following, to wit:

TRANSCRIPT.

Declaratory statement of Job Smith.

SALT LAKE CITY, U. T., *Dec.* 11, 1872.

To the Hon. ELIAS SMITH,
Probate Judge of Salt Lake County, U. T.:

We hereby claim the following tract or parcel of land, situated in the city of Salt Lake, under the provisions of an act of the Territorial legislature, approved February 17, 1869, to wit: Eighteen and a half feet fronting east by ten rods running back west of lot one (1), block
3 fifty-eight (58), plat A, described as follows: Commencing at a point 179½ feet from the southeast corner of said lot, thence west 5 rods; thence south 14½ feet; thence west 5 rods; thence north 2 rods; thence east 10 rods; thence south 18½ feet to the place of beginning, in section 1, T. 1, S. R. 1 W., and ask that we may be so adjudged.

(Signed) JOB SMITH.
do. ADELAIDE SMITH.

(Indorsed:) Adverse claimant. No. 32. 110. Application of Job Smith. Filed Dec. 11, 1872. Entered book 4, page 12. E. W. East, county clerk, p. D. Brockholt, dep.

TERRITORY OF UTAH,
Salt Lake County, ss:

In the probate court of said county. Hon. Elias Smith, judge.

To the sheriff of Salt Lake County, or any of his deputies, greeting:

Whereas a declaratory statement has been filed by Job Smith and Adelaide Smith in accordance with an act of the legislative assembly of the Territory of Utah, approved February 17, 1869, entitled "An act prescribing rules and regulations for the execution of the trust arising under an act of Congress entitled an 'Act for the relief of the inhabitants of cities and towns upon the public lands, approved March 2, 1867,'" claiming an allottment of land included in the entry of the town site of Salt Lake, made by Hon. D. H. Wells, mayor of said city, and praying that he may be adjudged the lawful owner and become possessed of the same in fee-simple, in accordance with said act.

These are therefore to command you to notify the said Job Smith and Adelaide Smith to appear before this court, at the court house in Salt Lake City, on the 8th day of July, A. D. 1872, at 2 p. m., to prosecute the title to the land so claimed by him. Hereof fail not, and make due return of this notice.

Given under my hand and the seal of said court this 2nd day of July, A. D. 1872.

(Signed) D. BROCKHOLT,
Probate Clerk.

(Endorsed:) In the probate court for Salt Lake County, U. T. Notice to Job Smith, D. S. Daud, att'y. Statement No. 32. Returnable July 8th, 1872.

SHERIFF'S OFFICE,
S. L. City, July 3rd, 1872.

I hereby certify that I have served the within notice by notifying said Job Smith on the 2nd day of July, 1872.

R. T. BURTON,
Sheriff S. L. County.

Fees & mileage, 45 c.

Declaratory statement of Mary G. Hussey.

TERRITORY OF UTAH,
City and County of Salt Lake, ss:

To the Hon. Elias Smith, probate judge in and for Salt Lake County, and to all others whom it may come:

The undersigned is the lawful owner of possession of the following-described piece or parcel of land, to wit: A part of lot number one (1) in block number fifty-eight (58), as plotted in plot A of the Salt Lake City survey, described as follows, to say: Commencing at a point on the east line of said lot one hundred and fifty and a half (150½) feet from the southeast corner of said lot, and running thence north two (2) rods; thence west ten (10) rods to the west line of said lot; thence south two (2) rods; thence east ten (10) rods to the place of beginning, and containing twenty (20) rods of ground, Salt Lake City survey, to all of which said land I claim to be entitled to a

deed in fee simple, in accordance with an act of the legislative assembly of the Territory of Utah entitled "An act prescribing rules and regulations for the execution of the trust," &c., approved February 17th, 1869.

(Signed) MARY G. HUSSEY,
P'r HORACE POTTER.

(Endorsed:) Adverse claimant. No. 110. 3774, 2485, 3505, 32. Declaratory statement of Mary G. Hussey, claiming part of lot 1, block 58. Filed Dec. 11, 1871. Entered book A, page 38. E. W. East, county clerk, p'r D. Brockholt, dep.

Amended declaratory statement of Mary G. Hussey.

TERRITORY OF UTAH,
City and County of Salt Lake, ss:

To the Hon. Elias Smith, probate judge in and for Salt Lake County, and to all others whom it may concern:

7 I, the undersigned, am the lawful owner of possession of the following piece or parcel of land, to wit: Part of lot number one (1) in block number fifty-eight (58), as plotted in plot A of the Salt Lake City survey, described as follows, to wit: Commencing at a point on the east line of said lot eight (8) rods south of the northeast corner of said lot, and running thence west ten (10) rods; thence south two (2) rods; thence east ten (10) rods; thence north two (2) rods to the place of beginning, containing twenty (20) square rods of ground, Salt Lake City survey, to all of which said land I claim to be entitled to a deed in fee simple, in accordance with an act of the legislative assembly of the Territory of Utah, entitled "An act prescribing rules and regulations for the execution of the trusts," &c., approved February 17, 1869.

(Signed) MARY G. HUSSEY,
By HORACE POTTER.

(Endorsed:) Adverse claimant. No. 3505, 3774, to amend 110. Declaratory statement of Mary G. Hussey, claiming part of lot 1 in
8 block 58, plot A. Filed May 24, 1872. Entered book A, page 110. D. Brockholt, county clerk.

TERRITORY OF UTAH,
Salt Lake County, ss:

In the probate court of said county, Hon. Elias Smith, judge.

To the sheriff of Salt Lake County, or any of his deputies, greeting:

Whereas a declaratory statement has been filed by Mary G. Hussey, in accordance with an act of the legislative assembly of the Territory of Utah, approved February 17, 1869, entitled "An act prescribing rules and regulations for the execution of the trust arising under an act of Congress entitled 'An act for the relief of the inhabitants of cities and towns upon the public lands,' approved March 2nd, 1867," claiming an allottment of land included in the entry of the town site of Salt Lake City made by Hon. D. H. Wells, mayor of said city, and praying that *he* may adjudged the lawful owner, and become possessed of the same in fee simple in accordance with said act:

9 These are therefore to command you to notify the said Mary G. Hussey to appear before this court at the court-house in Sa.t

Lake City, on the 8th day of July, A. D. 1872, to prosecute the title to the land so claimed by *him*.

Hereof fail not, and make due return of this notice.

Given under my hand and seal of said court this 2nd day of July, A. D. 1872.

[L. S.] (Signed) D. BROCKHOLT,
Probate Clerk.

(Endorsed:) Adverse claimant. In the probate court for Salt Lake County, U. T. Notice to Mary G. Hussey. H. S. Potter, agt. Statement No. 110, 3505, 32, 3474. Returnable July 8th, 1872.

SHERIFF'S OFFICE,
Salt Lake City, July 3rd, 1872.

I hereby certify that I have served the within notice by leaving a copy of notice with H. S. Potter on the 3rd day of July, 1872.

R. T. BURTON,
Sheriff S. L. County.

Fees and mileage 55 c.

Declaratory statement of W'm Jennings.

TERRITORY OF UTAH,
City and County of Salt Lake, ss:

10 To the Hon. Elias Smith, probate judge in and for Salt Lake County, and to all others whom it may concern:

I, the undersigned, am the lawful owner of possession of the following piece or parcel of land, to wit: Part of lot number eight (8) in block fifty-eight (58,) described as follows, to wit: Commencing eight (8) rods south of the northeast corner of said lot, and running thence west ten (10) rods; thence south two (2) rods; thence east five (5) rods; thence north fourteen feet and six inches (14 ft. 6 in.); thence east five (5) rods to the east line of said lot; thence north eighteen feet six inches (18 ft. 6 in.), to the place of beginning, containing fifteen (15) square rods and one hundred and sixty-five square feet of ground, more or less, as plotted in plot A of the Salt Lake City survey, to all of which said land I claim to be entitled to a deed in fee simple, in accordance with an act of the legislative assembly of the Territory of Utah, entitled "An act prescribing rules and regulations for the execution of the trust, &c.," approved February 17, 1869.

(Signed) W'M JENNINGS,
11 Per B. W. JENNENS.

(Endorsed:) Adverse claimant. No. 3474, 3505, 110. Declaratory statement of William Jennings claiming part of lot 8, block 58, plot A. Filed May 24, 1872. Entered book C, page 101. D. Brockholt, county clerk, per E. A. S.

Notice to W'm Jennings.

TERRITORY OF UTAH,
Salt Lake County, ss:

In the probate court for said county, Hon. Elias Smith, judge.

To the sheriff of Salt Lake County, or any of his deputies, greeting:

Whereas a declaratory statement has been filed by William Jennings in accordance with an act of the legislative assembly prescribing rules and regulations for the execution of the trust arising under an act of

Congress, entitled "An act for the relief of the inhabitants of the cities and towns upon the public lands," approved March 2, 1867, claiming an allotment of land included in the entry of the town site of Salt Lake
12 City, made by Hon. D. H. Wells, mayor of said city, and praying that he may be adjudged the lawful owner and become possessed of the same in fee simple, in accordance with said act:

These are, therefore, to command you to notify the said William Jennings to appear before this court, at the court-house in Salt Lake City, on the 8th day of July, A. D. 1872, at 2 p. m., to prosecute the title to the land so claimed by him.

Hereof fail not, and make due return of this notice.

Given under my hand and seal of said court this 2nd day of July, A. D. 1872.

(L. S.) (Signed) D. BROCKHOLT,
Probate Clerk.

(Endorsed:) In the probate court for Salt Lake County, U. T. Notice to William Jennings. Statement No. 3474, 32, 110, 3505. Returnable July 8, 1872.

SHERIFF'S OFFICE,
S. L. City, July 3, 1872.

I hereby certify that I have served the within notice by reading to said W'm Jennings, on the 2nd day of July, 1872.

R. T. BURTON,
Sheriff S. L. County.

Fees, 35 c.

13 TERRITORY OF UTAH,
Weber County, ss:

Before me, the undersigned, authorized to administer oaths in said county, this day personally appeared William Kay, personally known to me to be the person he represents himself to be, who, being duly sworn, on his said oaths deposes and say that on or about the day of January, A. D. 1849, he was the owner and in possession of lot No. one of block No. 76, of plat A, Salt Lake City survey, in Utah Territory, and that on or about the day of May, A. D. 1849, he exchanged the same with William Richards for lot No. 1 of block 58, plat A of said city, and took possession thereof and put improvements thereon; that he held peaceable and quiet and undisputed possession of said lot No. one of block 58, as the owner thereof, until about the year A. D. when he transferred and sold rods from off the north end of said lot to John Kay; and afterwards on the 20th day of May, A. D. 1855, he sold and transferred five rods off the south end to John R. Winder,
14 and afterwards, on the 7th day of May, A. D. 1856, he sold and transferred to Job Smith the north part of the south half of said lot; and that the said John Kay and others before mentioned did take possession of the said parts of said lot so sold, and transferred by me to them as the several owners thereof; that he sold and transferred the remaining part of the lot on or about May 7th, A. D. 1856, to trustees in trust, who also took possession thereof.

And further deponent saith not.

(Signed) WM. KAY.

Sworn to and subscribed before me on this 25th day of May, A. D. 1872.

(Signed) C. F. MIDDLETON,
Justice of the Peace Odgen Princinct, Weber County, U. T.

(Indorsed:) In the matter of the application of Job Smith and Adelaide Smith for title to city lot, part of lot 1, block 58. Affidavit of D. S. Dana, att'y for petitioner.

Affidavit of Adelaide F. Smith.

15 Before the probate court, Salt Lake County. In the matter of application of Job Smith and Adelaide F. Smith, ex parte.

The said Adelaide F. Smith, being duly sworn according to law, deposes and says that the premises upon which application was filed in this cause for a deed from the city of Salt Lake, was purchased of one John S. Woodbury, on the 12th day of October, A. D. 1863, at and for the price of two hundred and seventy-five ($275.00) dollars, and were paid for as follows, namely: The sum of ($205.00) two hundred and five dollars was paid to said Woodbury from the separate money and property of affiant, the said Adelaide F. Smith, being forty sheep (the separate property of affiant) at $4.50 per head, and twenty-five ($25.00) dollars in cash, making the sum of $205.00 so paid of the separate property of the said affiant; and that the residue of said pruchase money was paid by the said Job Smith in a yoke of oxen, estimated to be worth seventy ($70.00) dollars.

(Signed) ADELAIDE F. SMITH.

16 Sworn to and subscribed before me this 27 day of June, 1872.

(Signed) E. SMITH,
Probate Judge.

(Indorsed:) In the matter of the application of Job Smith and Adelaide Smith for deed to city lot. Affidavit of Adelaide Smith.

TERRITORY OF UTAH,
County of Salt Lake, ss:

ADELAIDE SMITH, being duly sworn according to law, deposes and says:

Q. 1. Are you or are you not the wife of Job Smith?

A. 1. I am the wife of Job Smith.

Q. 2. State whether or no you paid any portion of the purchase money for the property in dispute from your separate money and property; and, if so, state how much you so paid, and how, and to whom it was paid.

A. 2. I transferred sheep belonging to me in care of Thomas P.
17 Smith, about 40 in number, more or less, at $4.50 per head, and paid $25.00 in money from my separate earnings while engaged teaching school at Weber.

Q. 3. To whom and how were those sheep transferred?

A. 3. I consented to M'r Smith that those sheep should be given as part payment.

Q. 4. State the amount paid for the land.

A. 4. I do not now remember the amount of the purchase-money paid for the land.

Q. 5. State whether you are now living on or in possession of the property in dispute.

A. 5. I am living on said premises with my husband Job Smith, following my business pursuits.

Q. 6. From whom was this land purchased?

A. 6. From M'r Woodburn.

Cross-examination by Z. Snow:

Q. How long have you been the wife of M'r Job Smith?

A. Twenty years the 5th day of January last.

Q. How did you get those sheep?

18 A. I bought them 13 years ago, and paid factory for them. I bought the factory of M'r John Needham, and paid him the money for it. I then bought the sheep from M'r T. P. Smith, and left them in his possession to avail myself of the sheep and their increase. M'r T. P. Smith, above referred to, is the father of M'r Job Smith, and who was then residing in Iron County, Utah.

Q. In what way did you obtain the money you speak of?

A. By my own labor, after my marriage.

Q. Are you and M'r Job Smith the present applicants for this land?

A. We are.

And further deponent saith not.

Judgment of probate court.

In the probate court for Salt Lake County, Territory of Utah.

IN THE MATTER OF THE APPLICATION OF JOB and Adelaide Smith, Mary G. Hussey, and William Jennings, respective applicants to be adjudged the legal owner' of a certain portion of lot No. 1, in block No. 58, plat A, Salt Lake City survey. } Judgment.

19 This matter came on for hearing in the probate court in and for the county of Salt Lake, Territory of Utah.

The statements herein having been filed as by law provided, and upon the investigation thereof, the affidavits herein filed, the testimony taken, and evidence produced in open court—

It is ordered and adjudged by the court that Mary G. Hussey is the rightful owner of all that portion of lot No. 1, in block No. 58, in plat A, Salt Lake City survey, described as follows, to wit: Commencing at a point on the east line of said lot one hundred and sixty-five feet (165 f't) north from southeast corner of said lot; thence north fourteen and one-half (14½) feet; thence west five (5) rods; thence south fourteen and one-half (14½) feet; thence east five (5) rods to the place of beginning.

It is further ordered and adjudged that Job Smith is the rightful owner and occupant of all that portion of lot No. 1, in block No. fifty-eight (58), plat A, Salt Lake City survey, described as follows,

20 to wit: Commencing at a point on the east line of said lot one hundred and seventy-nine and one half (179½) feet north from the S. E. corner of said lot; thence north eighteen and one half (18½) feet; thence west ten (10) rods; thence south thirty-three (33) feet; thence east five (5) rods; thence north fourteen and one-half (14½) feet; thence east five (5) rods to the place of beginning.

It is also ordered and adjudged that the said Adelaide F. Smith has no right or title to the aforesaid piece of land, and that William Jennings is not the rightful owner and occupant of the above-described premises, or any part thereof.

It is therefore further ordered that a certificate of title be issued to the said Mary G. Hussey and the said Job Smith, in accordance with this judgment, and that the application of Adelaide F. Smith, joint

applicant with Job Smith, and the application of William Jennings are null and void.

Done this 10th day of July, A. D. 1872.

(Signed) E. SMITH,
Judge of the Probate Court in and for Salt Lake County, Territory of Utah.

21 *Notice of appeal.*

In probate court.

TERRITORY OF UTAH,
Salt Lake County:

MARY G. HUSSEY }
vs.
JOB SMITH. }

Please take notice that the plaintiff in the above entitled action hereby appeals to the district court of the Territory of Utah from the judgment therein made and entered in the said probate court on the 10th day of July, 1872, in favor of Job Smith in said action, and against the said plaintiff, and from the whole thereof.

MARY G. HUSSEY,
(Signed) By SNOW & HOGE,
Her Att'y'.

To the clerk of the said probate court, and to Dana, att'y for Job Smith.

TERRITORY OF UTAH,
Salt Lake County:

E. D. Hoge, being duly sworn, deposes and says that he served the within notice on Job Smith on the 15th day of July, 1872, about
22 four o'clock p. m. of said day, by leaving a thereof at his residence with Adelaide Smith, wife of the said Job Smith, she being a person of suitable age and discretion, the said Job Smith not being found at the time of service, he being absent from his residence.

(Signed) E. D. HOGE.

Subscribed & sworn to before me Ap'l 3rd, 1873.

JOS. F. NOUNNAN,
Clerk.
By E'W'D B. McKEAN,
Dep't Clerk.

(Indorsed:) Mary G. Hussey vs. Job Smith. Notice of appeal.

Bond on appeal.

Probate court.

TERRITORY OF UTAH,
Salt Lake County:

MARY G. HUSSEY }
vs.
JOB SMITH. }

23 Whereas the plaintiff in the above-entitled action is about to appeal to the district court for the third judicial district of the Territory of Utah from a judgment entered against said plaintiff in

said action in the said probate court for Salt Lake County, in favor of the defendant in said action, on the 10th day of July, 1872:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, William Jennings, of the city and county of Salt Lake, and Z. Snow, of the same place, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against the said appellant on the appeal, not exceeding two hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

July 15, 1872.

(Signed) WILLIAM JENNINGS.
Z. SNOW.

24 TERRITORY OF UTAH,
Salt Lake County:

William Jennings, merchant, and Z. Snow, att'y at law, being duly sworn, each for himself, and not one for the other, deposes and says that he is worth the amount specified in the within undertaking, over and above his just liabilities and property exempt from execution.

(Signed) WILLIAM JENNINGS.
Z. SNOW.

Subscribed & sworn to before me this 15th day of July, A. D. 1872.
W'M S. WALKER, *Clk*,
By S. P. TAFT, *D. C.*

(Indorsed:) Filed July 15, 1872. D. Brockholt, clerk.

TERRITORY OF UTAH,
County of Salt Lake, ss:

Probate court for said county, Hon. E. Smith, judge.

25 To the Hon. D. H. Wells, mayor of Salt Lake City, greeting:

Whereas an appeal has been taken from the judgment rendered in this court on the 10th day of July, A. D. 1872, in the matter of application of Job Smith, Adelaide Smith, Mary G. Hussey, and William Jennings, each respectively praying to be adjudged the legal owners of a certain piece of lot 1, in block 58, plat A, Salt Lake City survey; and whereas certificates of title have been issued respectively to Job Smith and Mary G. Hussey:

These are therefore to command you to defer the issuance of a deed in fee simple in the aforesaid case until otherwise directed adversely to this order.

Given under my hand and the seal of said court this 15th day of July, A. D. 1872.

[L. S.] (Signed) D. BROCKHOLT,
Clerk.

26 TERRITORY OF UTAH,
County of Salt Lake, ss:

I, D. Brockholt, clerk of the probate court in and for the county of Salt Lake, in the Territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of the judgment roll in the matter of application of Job and Adelaide Smith et al., on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 27th day of July, A. D. 1872.

[SEAL.] D. BROCKHOLT,
Probate Clerk.

TERRITORY OF UTAH,
County of Salt Lake:

In the district court of the 3rd judicial district of said Territory.

At a term of said court holden at Salt Lake City, in said Territory, on the 21st day of March, 1873, among other proceedings the following appeared of record, viz:

27 MARY G. HUSSEY
vs.
JOB SMITH ET AL.

Appeal from probate court of Salt Lake County.

On motion of Snow and Hoge, counsel for Mary G. Hussey, and on it appearing to the court upon suggestion of a dimunition of record in the transcript in this case filed September 15, 1872, it is ordered that a certiorari issue from this court to the probate court of Salt Lake County, commanding it to send to this court a full, complete, and perfect transcript of the record of the proceedings and testimony had before it in the case of Mary G. Hussey, Job Smith, Adelaide Smith, and William Jennings, were applicants for a piece of land situate in the city of Salt Lake, and Territory of Utah, and by it determined on the 10th day of July, 1872.

28 The foregoing transcript on appeal is endorsed as follows: "Appeal from probate court, Salt Lake County, U. T., in the matter of Job Smith, Adelaide Smith, Mary G. Hussey, and William Jennings, respective applicants, to be adjudged the legal owners of a portion of lot 1, block 58, plot A, Salt Lake City survey. Filed Sept. 5, 1872. W'm T. Walker, clerk."

Afterwards, to wit, on the 21st day of March, 1873, the clerk of this court, on the application of Snow & Hoge, and by order of court, issued a writ of certiorari, which is in the words and figures following, to wit:

Certiorari.

Territory of Utah, third judicial district court, Hon. Jas. B. McKean, judge.

MARY G. HUSSEY
vs.
JOB SMITH ET AL.

Appeal from the probate court of Salt Lake County.

29 The people of the Territory of Utah to Elias Smith, judge of probate of Salt Lake County, Territory of Utah, greeting:

Whereas, it appearing to us, on the motion of Snow & Hoge, attorney' for Mary G. Hussey, the party beneficially intrusted in a case lately before you, wherein there was an application by the said Mary G. Hussey, Job Smith, Adelaide Smith, and William Jennings for a piece or parcel of land situate in Salt Lake City, pursuant to the act entitled "An act prescribing rules and regulations for the execution of the trust arising under the act of Congress, entitled 'An act for the relief of the in-

habitants of cities and towns upon the public lands, approved March 2nd, 1867,'" approved February 17, 1869, which you decided July 10th, 1872, and which has been appealed to the district court of the third judicial district of this Territory, that there is a dimunition of the record and testimony in said case; and we being willing that said record
30 and testimony may be prefected, to the end that right and justice be done, the parties hereto do command you forthwith, after this writ shall come to your possession, to certify to our said district court a full, complete, and perfect record and testimony had before you in said application.

Witness the honorable James B. McKean, judge of our said court, this 21st day of March, 1873.

JOS. F. NOUNNAN, *Clerk*,
By ED. B. McKEAN, *Dep. Clk.*

Afterwards, to wit, on the 29th day of March, A. D. 1873, the above writ was returned with the following endorsement, to wit:

Return of certiorari.

TERRITORY OF UTAH,
Salt Lake County, ss:

In obedience to the commands of this writ, I, D. Brockholt, clerk of the probate court of Salt Lake County, in the Territory of Utah, hereby return to the court, in addition to the testimony and papers embraced in the certificate issued from this court on the 27th day of July,
31 1872, that there was exhibited in evidence in this case before the probate court the judgment roll of the district court of the third judicial district of this Territory, in a case wherein John M. Bernheisel was complainant and Job Smith and James Lynfaith were respondents, consisting of the original papers, hereto attached, and made a part of this return, and the original entries in the journals of said court in connection therewith; also the original deeds, hereto attached and made a part of this return.

Witness the Hon. Elias Smith, judge of our said court, this the 26th day of March, A. D. 1873.

D. BROCKHOLT,
Clerk of Probate Court, Salt Lake County, U. T.

$3.00.

Received three dollars from Snow & Hodge, att'y' for Mary G Hussey.
D. BROCKHOLT, *Clerk.*

32 EXHIBIT B.

Territory of Utah, third judicial district court, September term, 1870; sitting in chancery, Hon. J. B. McKean, chancellor.

JOHN M. BERNHESIL
vs.
JOB SMITH AND JAMES LYNFORTH. } To foreclose mortgage.

Humbly complaining, your orator, John M. Bernhesil, of the city and county of Salt Lake, in the Territory of Utah, shows unto this hon. court that on the 30th day of September, 1868, he loaned in money, to one Job Smith, also of said city and county, the sum of thirteen hundred and fifty (1,350.00) dollars, and took from him a promissory note, payable to himself or his order on or before the 30th day of November, 1869,

for the sum of thirteen hundred and fifty dollars, bearing interest at the rate of two per cent. (2%) per month, payable monthly in advance
33 from date till paid, for value received, and a deed of conveyance from the said Job Smith, of the following described real estate land claims and the improvements thereon, viz. situate, lying, and being in the county of Salt Lake, and Territory of Utah, being part of lot one (1), block fifty-eight (58), plat A, Salt Lake City survey, in said county, beginning at a point on the west side of East Temple street, eight (8) rods south of the northeast corner of said lot, and running thence west ten (10) rods; thence south two rods; thence east five (5) rods; thence north fourteen feet six inches (14 f't 6 in.); thence east five (5) rods to East Temple street; thence north eighteen feet six inches (18 f't 6 in.), to the place of beginning, containing fifteen (15) square rods and one hundred and sixty-five (165) square feet of ground, together with all the rights, privileges, and appurtenances thereunto belonging, or in any wise appurtaining; which deed of conveyance is commonly called a mortgage, and is subject to a condition to be void on the payment of the money in said note specified according to the true intent and meaning thereof, and is recorded in the records of Salt Lake County,
34 book B, page 632, August 20, 1869, to which, if need require, he asks leave to refer for greater certainty. He further says the money in said note mentioned has not been paid, nor any part thereof, except twenty dollars received on account of interest, on the 11th day of November, 1869, and fifteen dollars received on account of interest, on the 29th day of December, 1869, though the time for its payment has long since elapsed.

Your orator further shows unto your honor that one James Lynforth, of San Francisco, State of California, also has a mortgage on the above-described property, to secure the payment of one thousand fifty-eight $\frac{43}{100}$ dollars, with interest at the rate of one per cent. per month, dated September 16th, 1869, due in twelve months from date, and that the said Lynforth has an agent in the person of William Jennings in this district and Territory. He therefore prays this hon. court to take this case into consideration, and order that the above-named Job Smith and James Lynforth be made parties to this bill, and that a subpœna may issue commanding them to appear in this hon.
35 court at its sitting in January next, and upon their oaths answer the alligations herein, and that on the final hearing this hon. court will ascertain the amount due the complainant on said note and mortgage, and unless the same shall be paid within some reasonable time to be named by the court, will order the property in said mortgage described to be sold as the law provides, to satisfy said note and mortgage, and that he may have such other and further relief as equity may require.

SNOW & HOGE,
Solicitors for Complainant.

TERRITORY OF UTAH,
3rd District:

The above-named John M. Bernhisel now comes and upon his oath says that he has heard the foregoing complaint read and knows the contents thereof, and that the several allegations therein are true in substance and in fact.

(Signed) JOHN M. BERNHISEL.

Subscribed and sworn to before me this 3rd day of December, 1870.
(Signed) W. S. WALKER,
Clerk.

(Indorsed:) 3rd dist. court, Utah Territory. James M. Bernhisel vs. Job Smith and James Lynforth. Bill to foreclose mortgage. Filed Dec. 3rd, 1870. Wm. S. Walker, clerk. Snow & Hoge, solicitors for complainant.

Mortgage.

This indenture, made the thirtieth day of September, in the year of our Lord eighteen hundred and sixty-eight, between Job Smith, of the city and county of Salt Lake, Territory of Utah, and John M. Bernhisel, of the same place, witnesseth:

That the said Job Smith, for and in consideration of the sum of thirteen hundred and fifty (1,350.00) dollars, to him in hand paid by the said John M. Bernhisel, the receipt whereof is hereby acknowledged, doth grant, bargain, sell, and convey unto the said John M. Bernhisel, and to his heirs and assigns forever, all the right of possession,
37 claim, and interest of the said Job Smith in and to the following described piece or parcel of land, being part of lot one (1), block fifty-eight (58), plat A, Salt Lake City survey, in said county, to wit: Beginning at a point on the west side of East Temple Street, eight rods south of the northeast corner of said lot, and running thence west ten (10) rods; thence south two (2) rods; thence east five rods; thence north fourteen feet six inches (14 ft. 6 in.); thence east five rods to East Temple street; thence north eighteen feet six inches (18 ft. 6 in.) to the place of beginning, containing fifteen (15) square rods, and one hundred and sixty-five (165) square feet of ground, together with all the rights, privileges, and appurtenances thereunto belonging or in any wise appertaining.

This conveyance is intended as a mortgage to secure the payment of a certain promissory note, made and issued by the said Job Smith to the said John M. Bernhisel, for the sum of thirteen hundred and fifty dollars, with interest at the rate of two per cent. per month from date until paid, the interest to be paid monthly in advance, said note bearing even date herewith, and made payable to the said John M. Bern-
38 hisel or order, on or before the thirtieth day of November, eighteen hundred and sixty-nine, which, if paid according to the tenor of said note, will render this conveyance void.

In witness whereof I have hereunto set my hand and seal this thirtieth day of September, eighteen hundred and sixty-eight.

NOTE.—The words "and one hundred and sixty-five square feet" interlined before signing.

(Signed) JOB SMITH.

Signed, sealed, and delivered in the presence of—
E. SMITH.
LOGAN W. B. MEGRAO.

TERRITORY OF UTAH.
County of Salt Lake:

Before Elias Smith, probate judge for said county, personally appeared Job Smith, whose name is subscribed to the foregoing instrument of writing as the maker thereof, and acknowledged that he executed the same of his free will and choice, for the purposes therein expressed, this thirtieth day of September, eighteen hundred and sixty-eight.

(Signed) E. SMITH,
Probate Judge for s'd County.

39 *Note.*

On or before the thirtieth day of November, eighteen hundred and sixty-nine, I promise to pay John M. Bernhisel or order the sum of thirteen hundred and fifty (1,350.00) dollars, with interest at the rate of two per cent. per month, payable monthly in advance, from date till paid, for value received.

Salt Lake City, September 30, 1868.

(Signed) JOB SMITH.

E. SMITH, witness.

Said note is indorsed as follows, viz: "Received, November 11, 1869, twenty dollars, interest, on account of the within. Received, Dec. 29, 1869, fifteen dollars, interest, on account of the within. Job Smith, Sept. 30, 1868—$1,350."

Said mortgage is endorsed as follows: Mortgage deed. Job Smith to John M. Bernhisel; recorded mortgage-book B, page 632, August 20th, 1869. Edwin D. Wooley, recorder, Salt Lake County, U. T. Exhibit A. Z. Snow.

40 *Decree on bill to foreclose mortgage.*

TERRITORY OF UTAH,
Salt Lake County:

Third district court for the Territory of Utah.

JOHN M. BERNHISEL
vs.
JOB SMITH AND JAMES LYNFORTH.

And now, on the 31st day of January, A. D. 1871, comes the said John M. Bernhisel, by his solicitors, Snow & Hoge, the said Job Smith and James Lynforth having been duly served with process and came not, be make default, the case came on to be heard on the bill and mortgage in the bill mentioned, and note therein described, when, upon consideration, the court finds that on the 13th day of September, A. D. 1868, the said Job Smith executed in due form of law a mortgage, and delivered the same to John M. Bernhisel, by which the said Job Smith conveyed unto the said John M. Bernhisel the following described land claim and improvements, situate in Salt Lake City and County, Territory of Utah, described as follows, viz: Part of lot one (1), block fifty-
41 eight (58), plat A, Salt Lake City survey, to wit: Beginning at a point on the west side of East Temple street, eight rods south of the northeast corner of said lot, running west ten rods; thence south two rods; thence east five rods; thence north fourteen feet six inches; thence east five rods to East Temple street; thence north eighteen feet six inches to the place of beginning, containing fifteen square rods and one hundred and sixty-five square feet, which mortgage was subject to a condition to be void if the said Job Smith should pay to the said John M. Bernhisel a sum of money specified in a certain promissory note dated September thirtieth, A. D. 1868, for the sum of thirteen hundred and fifty dollars, due on or before the 30th day of November, 1869, and bearing interest at the rate of two per cent. per month, payable monthly in advance from date till paid.

The court further finds there is now due on said mortage and note, including principal and interest, the sum of one thousand nine hundred and seventy one dollars.

It is therefore ordered, adjudged, and decreed by the court that unless said sum of money be paid within five days from the date
42 hereof, that M. T. Patrick, United States marshall for Utah Territory, proceed according to law to sell the above described property to make said sum of money, together with the costs of this suit, taxed at twenty dollars.

(Signed) JA'S B. McKEAN,
Judge of 3rd Dist. Court.

(Indorsed:) John M. Bernhisel vs. Job Smith and James Lynforth. Decree. January 31st, 1871. W. S. W.

Order of sale.

In the district court, third judicial district, in and for the Territory of Utah:

JOHN M. BERNHISEL, PLAINTIFF,
vs.
JOB SMITH AND JAMES LYNFORTH, DEFENDANTS.

To the United States marshall of said Territory, greeting:

43 Whereas John M. Bernhisel, on the 31st day of January, A. D. 1871, recovered a judgment and decree against Job Smith and James Lynforth in an action wherein John M. Bernhisel was plaintiff and Job Smith and James Lynforth were defendants, which said judgment and decree is recorded in judgment book A, of the said district court, page 61, and which is in the words and figures following, to wit:

"Now on this 31st day of January, A. D., 1871, comes the said John M. Bernhisel by his solicitors, Snow and Hoge, the said Job Smith and James Lynforth having been duly served with process, and came not, but make default, the case came on to be heard on the bill and mortgage in the bill mentioned and note there described, when upon consideration the court finds that on the 13th day of September, A. D. 1868, the said Job Smith executed in due form of law a mortgage, and delivered the same to John M. Bernhisel, by which the said Job Smith conveyed unto the said *Job* M. Bernhisel the following described land claim and improvements, situate in Salt Lake City and County, Territory of Utah, described as follows, viz: Part of lot one, (1), block fifty-
44 eight (58), plat A, Salt Lake City survey, to wit: Beginning at a point on the west side of East Temple street, eight rods south of the northeast corner of said lot, running thence west ten rods; thence south two rods; thence east five rods; thence north fourteen feet six inches; thence east five rods to East Temple street; thence north eighteen feet six inches, to the place of beginning, containing fifteen square rods and one hundred and sixty-five square feet, which mortgage was subject to a condition to be void if the said Job Smith should pay to the said John M. Bernhisel, a sum of money specified in a certain promissory note, dated September 13th, A. D. 1868, for the sum of thirteen hundred and fifty dollars, due on or before the 30th day of November, A. D. 1869, and bearing interest at the rate of two per cent. per month, payable monthly, in advance, from date, till paid.

The court further finds there is now due on said mortgage and note, including principal and interest, the sum of one thousand nine hundred and seventy-one dollars."

It is therefore ordered, adjudged, and decreed by the court that unless said sum of money be paid within five days from the date
45 hereof, that M. T. Patrick, United States marshal for Utah Territory, proceed according to law to sell the above described prop-

erty to make said sum of money, together with the costs of this suit, taxed at twenty dollars.

Now, therefore you, the said U. S. marshal, are hereby commanded and requested to proceed to notice for sale, and to sell the premises above described, to apply the procceds of such sale to the satisfaction of said judgment, with the interest thereon, and costs, together with your fees, and to make and file your return of such sale to the clerk of the said district court within thirty days from the date thereof, and to do all things according to the terms and requirements of said judgment, and the provisions of the statute in such case made and provided.

Witness the Hon. Ja's B. McKean, judge of the third judicial district court of the Territory of Utah, and the seal of said court this 6th day of February, A. D. 1871.

[SEAL.] W'M S. WALKER, *Clerk.*

46 (Indorsed:) 3rd dist. court, Utah Territory. John M. Bernhisel vs. Job Smith and James Lynforth. Order of sale.

Order of sale, appraisements, &c.

THE TERRITORY OF UTAH,
Salt Lake County, ss:

An inquisition taken at Salt Lake City, in the county and Territory aforesaid, on the 16th day of February, before me, M. T. Patrick, marshal of the United States for the district of Utah.

Whereas, by virtue of a certain order of sale issued from the district court of the third judicial district of the Territory of Utah, wherein John M. Burnhisel is plaintiff and Job Smith and James Lynforth are defendants, and returned to said court on the day of , A. D. 1870, such proceedings have thereupon been had that the United States marshal of the district of Utah hath, agreeably to the statute in such case made and provided, levied upon the real estate of the said Job
47 Smith and James Lynforth, situate in said Territory, county, and city of Salt Lake, described as follows, to wit:

Part of lot one (1), block fifty-eight (58), plat A, Salt Lake City survey, to wit: Beginning at a point on the west side of East Temple street, eight rods south of the northeast corner of said lot, running thence west ten rods; thence south two rods; thence east five rods; thence north fourteen feet six inches; thence east five rods to east Temple street; thence north eighteen feet six inches to the place of beginning; containing fifteen square rods and one hundred and sixty-five square feet. And thereupon the said United States marshal of the district of Utah has summoned and called and inquest of three disinterested freeholders, resident within said county and the immediate neighborhood in which said property is situated, to wit, David F. Walker, H. W. Lawrence, and James Wells being duly sworn to appraise the said estate and personal property so levied upon make return and say, upon actual view of said premises and property, forthwith after such view, that the premises and property above described are of
48 the value of $1,800.00.

In testimony whereof I, the marshal aforesaid, and the inquest aforesaid, have to this appraisement set our hands and seals on the day and year first above written.

(Signed) M. T. PATRICK,
U. S. Marshal. [SEAL.]
DAVID F. WALKER. [SEAL.]
H. W. LAWRENCE. [SEAL.]
JAMES WELLS. [SEAL.]

TERRITORY OF UTAH,
Salt Lake County, ss:

I do hereby certify that the above-named appraisers were freeholders and residents of the county where said lands are situated, and that they were duly summoned and sworn by me according to law, on the day and year first above written.

(Signed) M. T. PATRICK,
U. S. Marshal Dist. of Utah.

To the honorable the judge within named:

In obedience and by virtue of the within order of sale, I advertised the said lands and tenements for sale at the court-house, in Salt
49 Lake City, on the 4th day of March, A. D. 1871, at ten o'clock a. m., in a public newspaper printed in Salt Lake City and County, called the Salt Lake Herald, and by posting up in public places three of said advertisements, one on the said premises and one at the said court-house, and after having given due notice of the time and place of such sale for over twenty days, I proceeded on the said 4th day of March, A. D. 1871, at 10 o'clock a. m. of said day, to offer said lands and tenements at public sale on the steps of the court-house in Salt Lake City and County, and then and there struck off to William Jennings the said lands and tenements described in the advertisement hereto attached,—
[Notice of marshal's sale take' from Salt Lake Herald and attached to this order of sale is now missing, having been torn herefrom]—
for the sum of three thousand (3,000) dollars, the sum so bid being over three-fifths the appraised value of said lots or parcel of land, and he being the highest and best bidder therefor, and the purchaser thereof.

Amount of sale, $3,000.00.

M. T. PATRICK,
United States Marshal.

50 Agreeable to an order of the court, issued by the 3rd district court on the 13th day of March, A. D. 1871, I have paid over in this case to plaintiff's attorneys, Snow and Hoge, $2,051$\frac{34}{100}$, whose receipt for the same is hereto attached; also to the marshals' clerk of court, their fees, $85.00; and the balance, $863.66, to W'm Jennings, to be applied on another mortgage, as shown by his receipt therefor hereto attached.

M. T. PATRICK,
United States Marshall.

SALT LAKE CITY, UTAH TER.,
March 14th, 1871.

JOHN M. BURNHISEL
vs.
JOB SMITH AND JAMES LYNFORTH.

Received of M. T. Patrick, U. S. marshall, eight hundred and sixty-three $\frac{66}{100}$ dollars, the balance of money in my hands after satisfying judgment and costs in the above-entitled cause, which is to be applied on mortgage of James Lynforth on the property sold, as per order of court made on March 13, 1871.

WILLIAM JENNINGS.

51 JOHN M. BURNHISEL
vs.
JOB SMITH AND JAMES LYNFORTH.

Received, Salt Lake City, March 15th, 1871, of M. T. Patrick, U. S. marshal, two thousand and fifty-one $\frac{34}{100}$ dollars, in full of judgment, back taxes, interest, and advertising in the above-entitled cause.

JOHN M. BURNHISEL,
By SNOW & HOGE,
His Att'y.

(Endorsed:) Exhibit D. John M. Burnhisel vs. Job Smith and James Lynforth. Order of sale, appraisement, &c.

[Internal-revenue stamps to the amount of $3 canceled.]

This indenture, made the 8th day of March, A. D. one thousand eight hundred and seventy-two, between M. T. Patrick, United States marshal for the district of Utah, the party of the first part, and William Jennings, of the city and county of Salt Lake, Territory of Utah, the party of the second part, witnesseth:

Whereas by virtue of a certain decree made the thirty-first day
52 of January, A. D. 1871, by the district court in and for the third judicial district of Utah Territory, in a certain action then pending in said court, wherein John M. Burnhisel was plaintiff and Job Smith and James Lynforth were defendants, it was ordered, adjudged, and decreed that the mortgage premises mentioned in the complaint in said action, and specifically described in said decree, should be sold by the said M. T. Patrick, United States marshal, according to law, to secure the sum of money found to be due to the said plaintiff.

And whereas the said United States marshal did, at the hour of 10 o'clock a. m., on the fourth day of March, A. D. 1871, after having caused an appraisement of the said premises to be duly made and due public notice thereof to be given as required by law, duly sell at public auction, at the court house in the city and county of Salt Lake, Territory aforesaid, agreeably to the said decree and the provisions of law, the premises in the said decree mentioned and described, at which sale the

said premises were struck off to the said William Jennings, the
53 said party hereto of the second part, for the sum of three thousand (3,000) dollars, he being the highest bidder, and that being the highest sum bid for the same.

And whereas the said court afterwards, to wit, on the thirteenth day of March, A. D. 1871, having examined the return and proceedings of the said marshal had upon the said sale, did therefore order the same approved and confirmed.

And whereas more than six months have elapsed since the date of said sale, and no redemption has been made of the premises so sold as aforesaid, by or on behalf of the said judgment debtor, Job Smith, or by or on behalf of any other person:

Now, therefore, this indenture witnesses, that into effect the sale so made by him as aforesaid, in pursuance of said decree, and in confirmation to the statutes in such cases made and provided, and also in consideration of the premises and of the said sum of three thousand (3,000) dollars lawful money so bid and paid to him by the said purchaser, the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and conveyed, and by the

54 presents does grant, bargain, sell, and convey unto the said party of the second part, and to his heirs and assigns forever, all that certain piece or parcel of land situate, lying, and being in the said city

and county of Salt Lake, Territory of Utah, and particularly described as follows, to wit: Part of lot one (1), block fifty-eight (58), plat A, Salt Lake City survey, beginning at a point on the west side of East Temple street, eight rods south of the northeast corner of said lot, running thence west ten rods; thence south two rods; thence east five rods; thence north fourteen feet six inches; thence east five rods to East Temple street; thence north eighteen feet six inches to the place of beginning, containing fifteen square rods and one hundred and sixty-five square feet.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversions, remainders, rents, issues, and profit thereof, and also all the *the* estate, right, title, and interest, property, possession, claim,
55 and demand whatsoever, as well in law as in equity, of the said party of the first part and of the said defendants, Job Smith and James Lynforth, or either of them, of, in, and to the said premises, and every part and parcel thereof.

To have and to hold all and singular the said premises hereby conveyed or intended so to be, together with the appurtenances, unto the said party of the second part, his heirs and assigns, forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

M. T. PATRICK, [SEAL.]
U. S. Marshal.

Signed, sealed, and delivered in presence of—
GEO. M. WALKER.
Z. SNOW.

UNITED STATES OF AMERICA,
Territory of Utah, County of Salt Lake, ss:

On this eighth day of March, A. D. one thousand eight hundred and seventy-two, personally appeared before me, W'm S. Walker,
56 clerk of the district court for the third judicial district of the Territory of Utah, M. T. Patrick, United States marshal for Utah Territory, whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as a party thereto, and duly acknowledged to me that he executed the same as such United States marshal freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Salt Lake City the day and year in this certificate first above written.

[SEAL.]
W'M S. WALKER,
Clerk 3rd Jud'l Dist. Court, Utah Territory.

(Endorsed :) Exhibit E. Deed. M. T. Patrick, U. S. marshal, to William Jennings.

57 *Motion to set aside appraisement and sale.*

In third judicial district court of the Territory of Utah.

JOHN M. BERNHISEL
vs.
JOB SMITH ET AL. } Decree January 31st, 1871, of foreclosure.

The said defendant, Job Smith, now comes and moves the court to set aside the appraisement and the sale of the mortgaged premises

herein sold on the 4th day of March, A. D. 1871, upon the order of sale issued herein on the 6th day of February, 1871.

First. Because it does not appear from the record and proceedings that any appraisement of said premises was had under the decree or after the rendition of the decree herein.

Second. The appraisement or pretended appraisement of said premises made is entirely too low.

Third. Because said sale was made by the United States marshall for said Territory, and not by the Territorial marshal or sheriff of the county.

Fourth. Because said sale is not confirmed by any order of this court, and because said defendant Smith claims that the time for the
58 redemption of said property from said sale has not expired as to him; that he has tendered the proper amount in lawful moneys to the purchaser at said sale of principal and entered in full for the redemption of said premises, and no deed has been issued to the purchaser.

Fifth. Because said defendant Smith still remains in possession, and the period of two years has not expired since the sale or pretended sale of said premises, and he is not barred from the redemption of said premises.

By D. T. DANA,
Att'y for Job Smith.

(Endorsed:) John M. Bernhisel vs. Job Smith et al. Notice to set aside appraisement and sale. Filed Jan. 13, 1873. W'm S. Walker, clerk. Dana for Smith.

59 *Deed.*

[50-cent internal-revenue stamp. Cancelled.]

Know all men by these presents that I, William Jennings, of the city and county of Salt Lake and Territory of Utah, for and in consideration of one dollar to me in hand paid by Mary G. Hussey, of the city of Cleveland in the county of Creyahoga, in the State of Ohio, have bargained and sold, and by these presents I convey and forever quitclaim to her, the said Mary G. Hussey, her heirs and assigns, all my right, title, interest, and claim in and to the following described real estate, situate, lying, and being in the said city of Salt Lake, being a part of lot one (1), block fifty-eight (58), plat A, of said Salt Lake City, County, and Territory first aforesaid, beginning for the same at a point on East Temple street, west side thereof, eight rods south of the northeast corner of said lot; thence west ten rods; thence south two rods; thence east five rods; thence north fourteen feet six inches; thence east five rods to East Temple street; thence north eighteen feet six inches to the place of beginning, containing fifteen square rods and one hundred and sixty-five square feet.

To have and hold the above granted and quitclaimed premises
60 to her, the said Mary G. Hussey, *his* heirs and assigns forever.

Witness my hand and seal this 9th day of March, 1872.

WILLIAM JENNINGS.

Signed, sealed, and delivered in presence of us—
WM. S. WALKER,
STILL. P. TAFT.

TERRITORY OF UTAH,
Salt Lake County:

Be it remembered that on this 9th day of March, 1873, before me, Wm. S. Walker, clerk of the 3rd judicial district court of Utah Territory, personally appeared the above named William Jennings to me personally known to be the signer and sealer of the foregoing instrument, and acknowledged the signing and sealing of the same to be his free act and deed.

[SEAL.] WM. S. WALKER,
Clerk 3rd Judicial Dist. Court of Utah Territory.

(Endorsed:) Deed p'r William Jennings to Mary G. Hussey.

61 Territory of Utah, third judicial district court, Hon. James B. McKean, judge.

MARY G. HUSSEY }
vs. }
JOB SMITH ET AL. }

Appeal from the probate court of Salt Lake County.

The people of the Territory of Utah to Elias Smith, judge of probate of Salt Lake County, in the Territory of Utah, greeting:

Whereas it appearing to us on the motion of Snow and Hoge, attorney' for Mary G. Hussey, the party beneficially interested in a case lately before you, wherein there was an application by the said Mary G. Hussey, Job Smith, Adelaide Smith, and William Jennings for a piece or parcel of land situate in Salt Lake City, pursuant to the act entitled "An act prescribing rules and regulations for the execution of the trust arising under the act of Congress, entitled 'An act for the relief
62 of the inhabitants of cities and towns upon the public lands,' approved March 2nd, 1867," approved February 17, 1869, which you decided July 10, 1872, and which has been appealed to the district court of the third judicial district of this Territory, that there is a *denominution* [diminution]* of the record and testimony in said case, and we being willing that said record and testimony may be perfected to the end that right and justice be d*isire* the parties hereto, do command you forthwith, after this writ shall come to your possession, to certify to our said district court a full, complete, and perfect record and testimony had before you in said application.

Witness the honorable James B. McKean, judge of our said court, this 21st day of March, 1873.

[SEAL.] JOS. F. NOUNNAN, *Clerk*,
By ED. B. McKEAN, *Dept. Clerk.*

63 TERRITORY OF UTAH,
Salt Lake County, ss:

In obedience to the commands of this writ, I, D. Bockholt, clerk of the probate court of Salt Lake County, in the Territory of Utah, hereby return to the court, in addition to the testimony and the papers embraced in the certificate issued from this court on the 27th day of July, 1872, that there was exhibited in evidence in this case before the probate court the judgment-roll of the district court of the third judicial district

* In pencil.—PRINTER.

of this Territory, in a case wherein John M. Bernhisel was complainant and Job Smith and James Lynforth were respondents, consisting of the original papers hereto attached and made a part of this return, and the original entries in the journals of said court in connection therewith; also the original deed, hereto attached and made part of this return.

Witness the Hon. Elias Smith, judge of our said court, this the 26th day of March, A. D. 1873.

[SEAL.] D. BROCKHOLT,
Clerk Probate Court Salt Lake County, U. T.

64 $3.00.

Received three dollars on fees from Z. Snow, att'y for Mary Hussey.

D. B. BOCKHOLT, *Clerk.*

(Indorsed:) Third judicial district court. Writ of certiorari between Mary G. Hussey, appellant, and Job Smith et al., appellees. Filed Mar. 29, 1873. Jos. F. Nounnan, clerk. Snow & Hoge, att'y' for Mary G. Hussey.

Afterwards, to wit, on March 29, 1873, the plaintiff filed in the clerk's office a paper, which is in words and figures as follows:

TERRITORY OF UTAH,
County of Salt Lake:

In the district court of the 3rd judicial district of said Territory.

At a term of said court, holden at Salt Lake City, in said Territory, on the 21st day of January, 1871, among other proceedings the following appears of record, viz:

65 JNO. M. BURNHISEL
vs.
JOB SMITH ET AL.

It appearing that the defendants herein had been regularly served with summons, and not appearing, it was ordered that their default be, and the same is hereby, entered; and it is further ordered that the clerk of this court compute the amount due upon the note and mortgage herein, and that plaintiff have judgment for the same as found due, and costs.

TERRITORY OF UTAH,
County of Salt Lake, ss:

I, Jos. F. Nounnan, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the record of the proceedings of the district court of the 3rd judicial district of the Territory of Utah in said matter as the same appears of record in my office.

Witness my hand and the seal of said court at Salt Lake City this 24th day of March, A. D. 1873.

[SEAL.] JOS. F. NOUNNAN, *Clerk.*

66 (Indorsed:) Filed M'ch 29, 1873. Jos. F. Nounnan, clerk. Paid $1.25 by Snow & Hoge, M'ch 24, 1873. Jos. F. Nounnan, clerk.)

Afterwards, to wit, on March 29, 1873, the plaintiff filed a paper in the clerk's office, which is in words and figures as follows:

TERRITORY OF UTAH,
County of Salt Lake:

In the district court of the 3rd judicial district of said Territory.

At a term of said court, holden at Salt Lake City, in said Territory, on the 13th day of March, 1871, among other proceedings the following appeared of record, viz:

JOHN M. BURNHISEL
vs.
JOB SMITH AND JAMES LYNFORTH.

Ordered, that the U. S. marshal's sale of mortgaged premises
67 herein be, and the same hereby is, confirmed and the judgment satisfied; and it is further ordered that the said marshal pay the taxes now due on said mortgaged premises out of the proceeds of said sale, and that balance remaining after the payment of said judgment, taxes, and costs be paid to William Jennings to apply on a certain mortgage held by James Lynforth, one of the defendants herein, on the aforesaid premises.

TERRITORY OF UTAH,
County of Salt Lake, ss:

I, Jos. F. Nounnan, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the record of the proceedings of the district court of the 3rd judicial district of the Territory of Utah on said matter as the same appears of record in my office.

Witness my hand and the seal of said court, at Salt Lake City, this 24th day of March, A. D. 1873.

[SEAL.] JOS. F. NOUNNAN, *Clerk.*

68 (Endorsed:) Filed March 29, 1873. Jos. F. Nounnan, cl'k. Paid $1.25 by Snow & Hoge, M'ch 24, 1873. Jos. F. Nounnan, cl'k.

Afterwards, to wit, on Aug. 4th, 1873, the defendant filed in the clerk's office a paper, which is in words and figures as follows:

J. M. BURNHISEL
vs.
JOB SMITH AND JAMES LYNFORTH.

Summons to Job Smith and James Lynforth "to answer the complaint" within ten days, for the foreclosure of a certain mortgage, as set out in the complaint on file in said cause, and for such other and further relief as equity may require "for the relief prayed for in said complaint."

Witness the Hon. C. M. Hawley, judge, this 3rd day December, 1870.

W'M S. WALKER, *Clerk.*

69 Return endorsed:

To the honorable the judges within named:

Served the within writ by leaving a certified copy of the summons and complaint attached with an adult person at the residence of Job

Smith, in Salt Lake City, and a copy of the summons with William Jennings, in Salt Lake City, the agent of James Lynforth, on the 4th day December, 1870.

(Signed) M. T. PATRICK,
U. S. Marshal.

(Endorsed:) Summons & endorsement. Bernhisel vs. Smith et al. Summons. Substance of copy.

In the district court of the 3rd jud'l district.

TERRITORY OF UTAH,
Salt Lake County:

MARY G. HUSSEY
vs.
JOB SMITH.

Job Smith, being first duly sworn, says that he was one of the
70 defendants in the case of J. M. Bernhisel vs. Job Smith and James Lynforth, on foreclosure of a mortgage in the court; that the only process served on him was a summons, and not a subpœna in chancery; that said summons required him to answer within ten days; that he has seen and read said summons frequently, and remembers it distinctly, together with the return of the U. S. marshall endorsed thereon; that said summons has been lost or abstracted from the files of this court; that this defendant does not know where said summons is; that he has not the same in his possession, and don't know how said summons was lost or taken from the files of this court, and, if the same was abstracted, this deponent has no knowledge of the same; that this deponent made memoranda from said summons and return, which said memoranda is hereunto attached and made part of this affidavit; that this affidavit is made to supply the loss of said summons from the files in said above-entitled cause; and that the same is necessary and material for the proper understanding and determination of the ques-
71 tions involved in the said above-entitled cause. Affiant never appeared in said case of Bernhisel vs. Smith & Lynforth.

JOB SMITH.

Sworn to and subscribed before me on this 4th day of Aug., 1873.

JOS. F. NOUNNAN, *Clerk*,
By E'W'D B. McKEAN,
Dep't' Clerk.

(Endorsed:) 779. In district court of the third judicial dis't, Territory of Utah. Mary G. Hussey vs. Job Smith. Filed Aug. 4th, 1873. Jos. F. Nounnan, clerk, by Ed. B. McKean, dep't' clerk.

At a term of said court, holden at Salt Lake City in said Territory, on the 13th day of August, 1873, among other proceedings the following appeared of record, viz:

MARY G. HUSSEY
vs.
JOB SMITH.

72 This cause coming on to be heard was fully argued by Z. Snow, esquire, for the plaintiff, and Samuel Merritt, esquire, for the defendent, and taken under advisement by the court.

73 *Judgment third dist. court, Aug.* 19, 1875.

In the district court of the third judicial district of the Territory of Utah.

MARY G. HUSSEY, APPELLANT,
vs.
JOB SMITH ET AL., APPELLEES. } Finding and decision of court.

The above-entitled cause came on regularly for hearing and trial on the day of August, A. D. 1873, on an appeal of the probate court in and for the county of Salt Lake, in said Territory, Mess'rs Snow and Hoge appearing as counsel for the appellant and Mess'rs Rosborough & Merritt as counsel for appellee.

A trial by jury having been expressly waived by the counsel for the respective parties, the said action was tried by the court sitting without a jury on the testimony before and sent up by the probate court on the appeal; and thereupon, after hearing the arguments of counsel for the respective parties, the cause was submitted to the court for consideration; therein the court finds the following as the facts of the case, to wit: That the said Job Smith purchased and went into the
74 possession of the hereinafter described in the year 1856, and he is now and ever since has been in the actual possession of the same.

In the year 1868 the said Job Smith made, executed, and delivered a mortgage upon said premises to one John M. Bernhisel; on the third day of December, A. D. 1870, a bill in chancery to foreclose said mortgage was filed in this court. Upon filing the bill a summons was issued out of this court, directed to the defendant named in the bill, which was served by the U. S. marshal of this Territory. The said Job Smith never appeared in said court, and such proceedings were afterwards had therein that this court, on the 31st day of January, A. D. 1871, granted a decree of foreclosure of said mortgage, and directed the U. S. marshal to sell said premises.

In pursuance of said decree, and by virtue thereof, the U. S. marshal sold said premises on the 4th day of March, 1871, and William Jennings became the purchaser thereof. On the ninth day of March, 1872, William Jennings made, executed, and delivered a deed of said premises to the appellant, Mary G. Hussey, a non-resident of this
75 Territory, but a resident of the State of Ohio.

In November, A. D. 1871, Daniel H. Wells, as mayor of the city of Salt Lake, entered this among other lands under an act of Congress entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," approved March 2nd, 1867. On the 11th day of December, A. D. 1871, both Job Smith and Mary G. Hussey, in accordance with an act of the *of the* legislature of this Territory, filed with the probate court of Salt Lake County a declaratory statement claiming on allotment of said premises included in the entry of the town site of Salt Lake City, and each praying to be adjudged the lawful owner and become possessed of the same in fee-simple.

Upon the hearing before the probate court that court ordered and adjudged that a certificate of title issued to Job Smith for the following-described premises, to wit: All that portion of lot No. one (1), in block No. fifty-eight (58), plot A, Salt Lake City survey, described as follows, to wit: Commencing at a point on the east line of said lot one hundred and seventy-nine and one-half (179½) feet north from the S. E. cor-

76 ner of said lot; thence north eighteen and one-half (18½) feet; thence west ten (10) rods; thence south thirty-three (33) feet; thence east five (5) rods; thence north fourteen and one-half (14½) feet; thence east five (5) rods, to the place of beginning.

And as a conclusion of law from the above facts the court finds that the said Job Smith is entitled to a deed from the mayor of the city of Salt Lake to the said premises, and that a certificate of title should issue to him therefore; and the court hereby orders that a certificate to the premises herein described be issued to the said Job Smith.

Dated this 19th day of August, A. D. 1873.

PHILIP H. EMERSON,
Judge of the 3rd Judicial Dist.

77 At a term of said court, holden at Salt Lake City, in said Territory, on the 19th day of August, 1873, among other proceedings the following appeared of record, viz:

MARY G. HUSSEY
vs.
JOB SMITH ET AL.

This cause having been heard before the court, a jury having waived by the parties, and the court having filed its findings of fact and conclusions of law this day:

It is therefore now ordered and adjudged that the decision of the probate court herein, that the respondent, Job Smith, is entitled to the town site, and to the premises in question, be, and the same is hereby, affirmed.

And it is further ordered that a certificate be issued accordingly; and that the respondent, Job Smith, have and recover of and from the appellant, Mary G. Hussey, his costs in this behalf incurred, taxed at $.

78 At a term of said court, holden at Salt Lake City, in said Territory, on the 20th day of August, 1873, among other proceedings the following appeared of record, viz:

MARY G. HUSSEY
vs.
JOB SMITH.

On the application of Snow & Hoge, attorneys for the plaintiff, it is ordered that the clerk of this court delay for ten days to issue the certificate hereinbefore ordered, to give her time to take an appeal to the supreme court from the decision hereinbefore made.

Afterwards, to wit, on August 28th, 1873, the plaintiff filed in the clerk's office a notice of appeal, which is in words and figures as follows:

Notice of appeal.

TERRITORY OF UTAH,
Third District Court:

MARY G. HUSSEY, APPELLANT,
vs.
JOB SMITH, APPELLEES.

Please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of this Territory from the judgment

79 therein made, decree entered in the said district court on the 19th day of August, 1873, in favor of the defendant and against said plaintiff, and from the whole thereof.

August 27th, 1873.

MARY G. HUSSEY,
By her atty's, SNOW & HOGE.

To the clerk of said district court, and to Rosborough & Merritt, atty's for Job Smith.

We accept service of a copy of this notice this August 28th, 1873.

ROSBOROUGH & MERRITT,
Atty's for Job Smith.

Afterwards, to wit, on August 30th, 1873, the plaintiff filed the following undertaking, which is in words and figures as follows:

Territory of Utah, third district court.

MARY G. HUSSEY, APPELLANT,
vs.
JOB SMITH, APPELLEE.

Whereas the plaintiff in the above-entitled cause appeals to the supreme court of the Territory of Utah from a judgment made and
80 entered against her in said action in the said district court in favor of the said Job Smith in said action on the 19th day of August, 1873, affirming a judgment of the probate court of Salt Lake County, wherein certain property was adjudged not to belong to the said Mary G. Hussey, but to belong to the said Job Smith on a certificate awarded to the said Smith directing the mayor of Salt Lake City, county of Salt Lake, in the Territory of Utah, to execute a deed for said property to the said Smith, which said property is described as follows, viz: All that certain piece or parcel of land situate, lying, and being in the said city and county of Salt Lake, Territory of Utah, and particularly described as follows, to wit: part of lot one (1), in block fifty-eight (58), plot A, Salt Lake City survey, beginning at a point on the west side of East Temple street eight rods south of the northeast corner of said lot, running thence west ten rods; thence south two rods; thence east five rods; thence north fourteen feet six inches; thence east five rods to East Temple street; thence north eighteen feet six inches to the place
81 of beginning, containing fifteen square rods and one hundred and sixty-five square feet, and adjudging and ordering the said Mary G. Hussey to pay the costs of suit, taxed at dollars.

Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, Enoch Reese and Z. Snow, both of the city and county of Salt Lake, and Territory of Utah, do hereby jointly and severally undertake and promise on the part of the appellant, that said appellant shall pay all damage and costs which may be awarded against the said Mary G. Hussey, on the appeal, not exceeding three hundred dollars, to which amount we severally bound.

Z. SNOW.
ENOCH REESE.

TERRITORY OF UTAH,
Salt Lake County, ss:

I, Zerubbabel Snow, one of the surities above named, make oath and say that I reside in Salt Lake County; that my occupation is the

practice of the law as an attorney, and that I am worth more than three hundred dollars over and above all my debts and liabilities, and
82 over and above my property exempt from execution.

Z. SNOW.

Subscribed and sworn to before me, this 30th day of August, 1873.

JOS. F. NOUNNAN, *Clerk*,
By W. S. JENKS, *D. C.*

And I, Enoch Reese, one of the above named surities, make oath and say that I reside in Salt Lake City and County. That my occupation is a merchant. That I am worth more than three hundred dollars over and above my just debts and liabilities, and over and above my property exempt by law from execution.

(Signed) ENOCH REESE.

Subscribed and sworn to before me this 30th day of August, 1873.

JOS. F. NOUNNAN, *Clerk*,
By W. S. JENKS, *D. C.*

(Endorsed:) Undertaking. Mary G. Hussey vs. Job Smith. Filed Aug. 30, 1873. Jos. F. Nounnan, clk., by W. S. Jenks, D. C.

83 TERRITORY OF UTAH,
County of Salt Lake, ss:

I, Jos. F. Nounnan, clerk of third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original files and records in the case of Mary G. Hussey vs. Job Smith, in my office.

Witness my hand and the seal of said court, at Salt Lake City, this fourth day of October, A. D. 1873.

[SEAL.] JOS. F. NOUNNAN, *Clerk.*

84 MARY G. HUSSEY
versus
JOB SMITH.

In the supreme court of Utah Territory, October term, 1873.

In the matter of Mary G. Hussey, appellant, and in the matter of Job Smith, respondent.

BOREMAN, J., rendered the opinion of the court:

These are especial proceedings under the act of Congress of March 2nd, 1867, commonly called the "Town-site law" (14 Stat. at Large, 541), and the act of the Territorial legislature, passed in pursuance thereof; and to carry out the trust arising thereunder, approved February 17, 1863. (Laws of Utah, 1869, p. 4.)

Mary G. Hussey and Job Smith are separate and distinct claimants for the same parcel of ground in the city of Salt Lake. They separately made their application to the probate judge, each asking for the government title, and each contesting the right of the other
85 thereto. Being adverse claimants, their cases necessarily are considered together. Upon hearing of the cases the probate court adjudged that the certificate of title issue to Job Smith, from which judgment of the probate court Mary G. Hussey appealed to the district court of the third judicial district of the Territory. The dis-

trict court affirmed the judgment of the probate court, and from this judgment of the district court Mary G. Hussey appealed to this court. The case was heard by the court, sitting without a jury, which made a finding of the facts and thereupon gave its conclusions of law and judgment accordingly.

From the beginning to the ending of this record there does not appear to have been any exception taken to any ruling of the court below, nor to the finding of facts, nor to the conclusions of law. No effort seems to have been made for a review of the case in the court below. There was no motion to correct the findings, nor any motion for a new
86 trial. We therefore must accept the findings of the court below as the true and correct statement of the case.

There is a vast amount of extraneous matter filed with the record, but no steps having been taken to make the same any part of the record, we cannot consider it. We have then only to consider whether the findings will support the judgment rendered thereon. In considering this question, let us first ascertain what the act of Congress, upon which the above case is founded, says. It reads as follows: Whenever any portion of the public lands of the United States have been or shall be settled upon and occupied as a town-site, and therefore not subject to an entry under the agricultural pre-emption laws, it shall be lawful, in case such town shall be incorporated, for the corporate authorities thereof, and if not incorporated for the judge of the county court for the county in which such town may be situated, to enter at the proper land-office and at the minimum price, the land so settled and occupied
87 in trust for the several use and benefit of the occupants thereof, according to their respective interests, the execution of which trust, as to the disposal of the lots in such town and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated, &c., &c. (Act of March 2nd, 1867, 14 Stat. at Large, 541.)

In accordance with the act of Congress the legislative authority of this Territory has made the necessary "rules and regulations" and upon no part of these is any question raised in this case.

In pursuance of the act of Congress and the Territorial act thereunder, as the findings of the court below show, in November, 1871, Daniel Wells, as mayor of the city of Salt Lake, entered the land in controversy, among other lands entered by him, as a "town-site."

The findings further show that on the 11th day of December, 1871,
88 both said Job Smith and Mary G. Hussey filed their statements with the probate judge of the county, claiming the premises in dispute; and that Job Smith had gone into possession thereof in 1856, and has remained in actual possession thereof ever since and is still so. They do not show that the appellant (Mary G. Hussey) ever was in possession of said land or any part thereof, or that she ever was one of the occupants of the "town-site," or that she was then or ever had been or is now even resident of the city of Salt Lake or of the Territory.

The only instance in which her residence is referred to is at the time she received a deed for this property from William Jennings on the 9th day of March, 1872, when she is declared to be a non-resident of this Territory, but a resident of the State of Ohio.

What then does "occupant" under the law mean, and which of the two parties was the "occupant" within the meaning of the law and the rightful claimant to the deed of title?

Shall we say that the party not in possession at any time is the "oc-

cupant," or shall we say that he who had the actual possession is
89 to be considered rightfully the "occupant"?

Upon these questions we are not without authority. The "town-site law" of 1844 is very similar to that of 1867 (now under consideration), so far as the question of occupancy goes. And the supreme court of Michigan, in the matter of Henry Selby and Spalding, appellants (6 Mich. 193), says that "the law of 1844 was, we think, very clearly designed to protect *bona fide* town settlers, and did not recognize any paramount individual claims over them."

The Secretary of the Interior (Jacob Thompson) in a letter to the Commissioner of the General Land Office, dated June 26, 1858, says that in the act of 1844, by the term "occupants" is meant those who are settlers or residents, and that it only embraces citizens thereof—that is, of the town.

The supreme court of Iowa in Hall *vs.* Doran (6 Iowa, 433), assert a like doctrine where the act is special, but with language similar to the general law, although they add that the party to be entitled to the land must have been the occupant at the time the county judge is re-
90 quired to make the deed and to execute the trust.

This question has also been under consideration in the Supreme Court of the United States, and passed upon by that tribunal in a case taken from Colorado. That case (Cofield vs. McClelland and Davis, decided December term, 1872, but not yet reported) arose under the law of 1844 and a special law for the relief of the citizens of Denver (13 Stat. at Large, 94); but the language of that special act, as well as the law of 1844, is similar to that of the law now under consideration.

The Supreme Court of the United States declare therein that "occupation" and "possession" give the "right," but assert that the occupancy and possession must exist at the time of the entry of the lands by the probate judge.

The Iowa case referred to says that the occupancy must exist at the time the county judge is required to make the deed. The Colorado case (by the U. S. Supreme Court) says that this occupancy must be at the time of the entry of land by the probate judge. Yet all the
91 cases referred to herein declare that the title must go to the actual occupant.

The appellant, Mary G. Hussey, never was an occupant, either at the date of entry of the land or at the time at which the deed was required to be made, or at any other time. She therefore has no right whatever to a deed for said premises.

The other party, Job Smith, having been in continued actual possession of said premises from 1856, he was, and is, an occupant within the full meaning of the law.

These points being decisive of this case, it is unnecessary to consider, the other questions raised.

The matter of the right of appeal from the probate court was not in issue.

The judgment of the district court is affirmed.

McKean, Ch. J., and Emerson, J., concurred.

92 TERRITORY OF UTAH,
County of Salt Lake, ss:

I, Cha's A. Gould, clerk of the supreme court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of an original decision made and filed by said supreme court, October 27th A. D. 1873.

In witness whereof I have set my hand and affixed the seal of said court this 12th day of May, A. D. 1876.

[SEAL.] CHA'S A. GOULD, *Clerk*,
By HARRY A. GOULD,
Deputy Clerk.

93 Afterwards, to wit, on the 9th day of October, A. D. 1873, said case came on to be heard in said supreme court of the Territory of Utah, and was argued by counsel of the respective parties, and by the court held under advisement until October 24th, 1873; and upon consideration the court entered the following decree:

Ordered and adjudged that the judgment of the district court be, and it is hereby, affirmed.

Supreme court.

TERRITORY OF UTAH,
County of Salt Lake:

Afterwards, to wit, on the 25th day of April, A. D. 1876, came the said Mary G. Hussey, by Snow and Hoge, her solicitors and counsel, and filed in the clerk's office of this court an affidavit and assignment of errors and allowance of appeal in said case, which are in the words and figures as follows, viz:

94 Territory of Utah, supreme court.

MARY G. HUSSEY, APPELLANT,
vs.
JOB SMITH, APPELLEE.

In the matter of the contest for a deed for a part of lot one, in block fifty-eight, plat A, Salt Lake City survey.

On the 22nd day of Appril, 1876, before me, C. G. Snow, a notary public within and for Salt Lake County, in said Territory of Utah, personally appeared Z. Snow, at said county, who was by me sworn in due form of law, and on his oath deposes and says that he is well acquainted with the land in contest in this action, and that in his judgment it is worth exceeding five thousand dollars.

Z. SNOW.

Subscribed and sworn to before me the day and year above written.

[SEAL.] CERA G. SNOW,
Notary Public.

95 (Endorsed:) Mary G. Hussey vs. Job Smith, aff't on appeal. Filed April 20th, A. D. 1876. Cha's A. Gould, cl'k, by H. A. Gould, dep'ty cl'k.

Allowance of appeal.

Territory of Utah, supreme court.

In the matter of the contest for a deed of a part of lot one, in block fifty-eight, plat A, Salt Lake City survey, between Mary G. Hussey, appellant, vs. Job Smith, appellee.

Now comes Mary G. Hussey, by Snow and Hoge, her counsellers and solicitors, and prays for an appeal in the above-entitled action to the

Supreme Court of the United States, from the decission of the
96 supreme court of the Territory of Utah, rendered on the 24th day of October, A. D. 1873.

SNOW AND HOGE,
Counselers and Solicitors for the Petitioners.

The appeal in this case is allowed as prayed for.
April 25th, 1875.
(Signed) PHILIP H. EMERSON.
Justice of the Supreme Court of Utah.

(Endorced:) Filed April 25th, A. D. 1876. Cha's A. Gould, clerk, by H. A. Gould, dep'ty cl'k.

THE UNITED STATES OF AMERICA:

Supreme court.

In the matter of the contest for a deed between Mary G. Hussey and Job Smith for a part of lot one, in block fifty-eight, plat A, Salt Lake City survey.

97 MARY G. HUSSAY APPELLANT,
vs.
JOB SMITH APPELLEE.

Now comes Mary G. Hussey, the appellant herein, and says, there is error in the records and proceedings in the supreme court of the Territory of Utah, rendered in this matter on the 24th day of October, 1873, in this, viz:

1st. It appears from the records and proceedings in this matter that on the 11th day of November, 1871, Daniel H. Wells, mayor of Salt Lake City, declared upon the land in contest among other lands, pursuant to the act of Congress entitled "An act for the relief of the inhabitants of cities and towns upon the public lands, approved March 2nd, 1867," on which said 11th day of November 1871, William Jennings was by virtue of the judicial sale to him entitled to the possesion of said land as against Job Smith, and that he afterward sold his right to the said Mary G. Hussay. It is therefore error to direct the deed to
98 be given to said Job Smith. It ought to have been ordered to be given to Mary G. Hussay.

2nd. The jurisdiction of a court of record is exclusively presumed unless from the record it negatively appears.

Therefor', the judgment of the district court of the third judicial district of the Territory of Utah, rendered on the 31st day of January, 1871, in the case of John M. Bernhisel against Job Smith et als., to foreclose the mortgage, ordering a sale of the property, and the sale and confirmation of sale, entered March 13th, 1871, were judicial action, and transferred the right of Job Smith to the land and the right of possession thereof to the purchaser, so that on the 11th day of November, 1871, the purchaser at such sale was in equity entitled to the possession of the land in contest. It is therefor' error to direct the deed to be given to Smith.

3rd. In a contest for a deed for land under the act of Congress, and under the act of Utah, the person who has the right in equity
99 to the land—as neither has the legal title—is to have the deed.

In this case it was Mary G. Hussay, as she had succeeded to the right of the purchaser under the judicial sale.

The said Mary G. Hussay therefor' prays for a reversal of said judgment and for an order directing the deed to be given to her.

SNOW AND HOGE,
Att'ys for Mary G. Hussay.

(Endorsed:) Supreme Court. Mary G. Hussay vs. Job Smith. Assignment of errors on appeal. Filed April 25th, A. D. 1876. Chas. A. Gould, Clerk of supreme court, by H. A. Gould, deputy clk.

100 (Original.)

The United States of America to Job Smith, greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 9th day of October, 1876, pursuant to an appeal*ed* which has been allowed and filed in the clerk's office, and taken to said Supreme Court of the United States, from a judgment rendered in the supreme court of the Territory of Utah on the 24th day of October, 1873, in a matter of a contest for a deed of a part of lot one, in block fifty-eight, plot A, Salt Lake City survey, between Mary G. Hussay, appellant, and yourself, appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be reversed and corrected, and speedy justice done in that behalf.

101 Witness the honorable Morrison R. Waite, Chief Justice of our said Supreme Court of the United States, this 22d day of April, 1876.

PHILIP H. EMERSON,
One of the Justices of the Supreme Court of the Territory of Utah.

We hereby acknowledge service of a copy of this citation.
April 28th, 1876.

ROSBOROUGH & MERRITT,
Att'y' for Appellee, Job Smith.

(Indorsed:) Supreme Court of the United States. Mary G. Hussay, appellant, vs. Job Smith, appellee. Citation. Filed April 28th, A. D. 1876. Chas. A. Gould, clerk, by H. A. Gould, dep'ty clerk.

102 *Bond on appeal.*

THE UNITED STATES OF AMERICA:

Supreme Court.

In the matter of the contest for a deed of a part of lot one, in block fifty eight, plat A, Salt Lake City survey, between Mary G. Hussay, appellant, and Job Smith, appellee.

Know all men by these presents that we, Lewis S. Hill and George Crismon, of the city and county of Salt Lake and Territory of Utah, are held and firmly bound unto Job Smith, above named, in the sum of three hundred dollars, to be paid to the said Job Smith, his executors and administrators; to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our heirs and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals and dated this 20th day of April, 1876.

103 Whereas the above-named Mary G. Hussay has sued out an appeal to this Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the Territory of Utah, rendered on the 24th day of October, 1873:

Now, therefore, the conditions of this obligation is such that if the said Mary G. Hussay shall prosecute her appeal with effect and answer all damages and costs, if she shall make good her plea, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

L. S. HILL. [L. S.]
GEORGE CRISMON. [L. S.]

Sealed and delivered in presence of—
Z. SNOW.

Approved by me.

PHILIP H. EMERSON,
Judge of the Supreme Court of Utah Territory.

104 (Endorsed:) Supreme Court of the United States. Mary G. Hussay, appellant, vs. Job Smith, appellee. Bond on appeal. Filed April 25th, A. D. 1876. Chas. A. Gould, clerk of sup. court, U. T., by H. A. Gould, dep'ty clk.

105 TERRITORY OF UTAH,
Salt Lake County:

I, Charles A. Gould, clerk of the supreme court in and for the Territory of Utah, hereby certify that the foregoing is the original citation issued in this case and filed in this office, and a true and correct copy of the bond on appeal in this case on file in my office.

In witness whereof I have set my hand and affixed the seal of said court this 12th day of July, 1876.

[SEAL.] CHARLES A. GOULD, *Clerk.*
By H. A. GOULD, *Deputy Clk.*

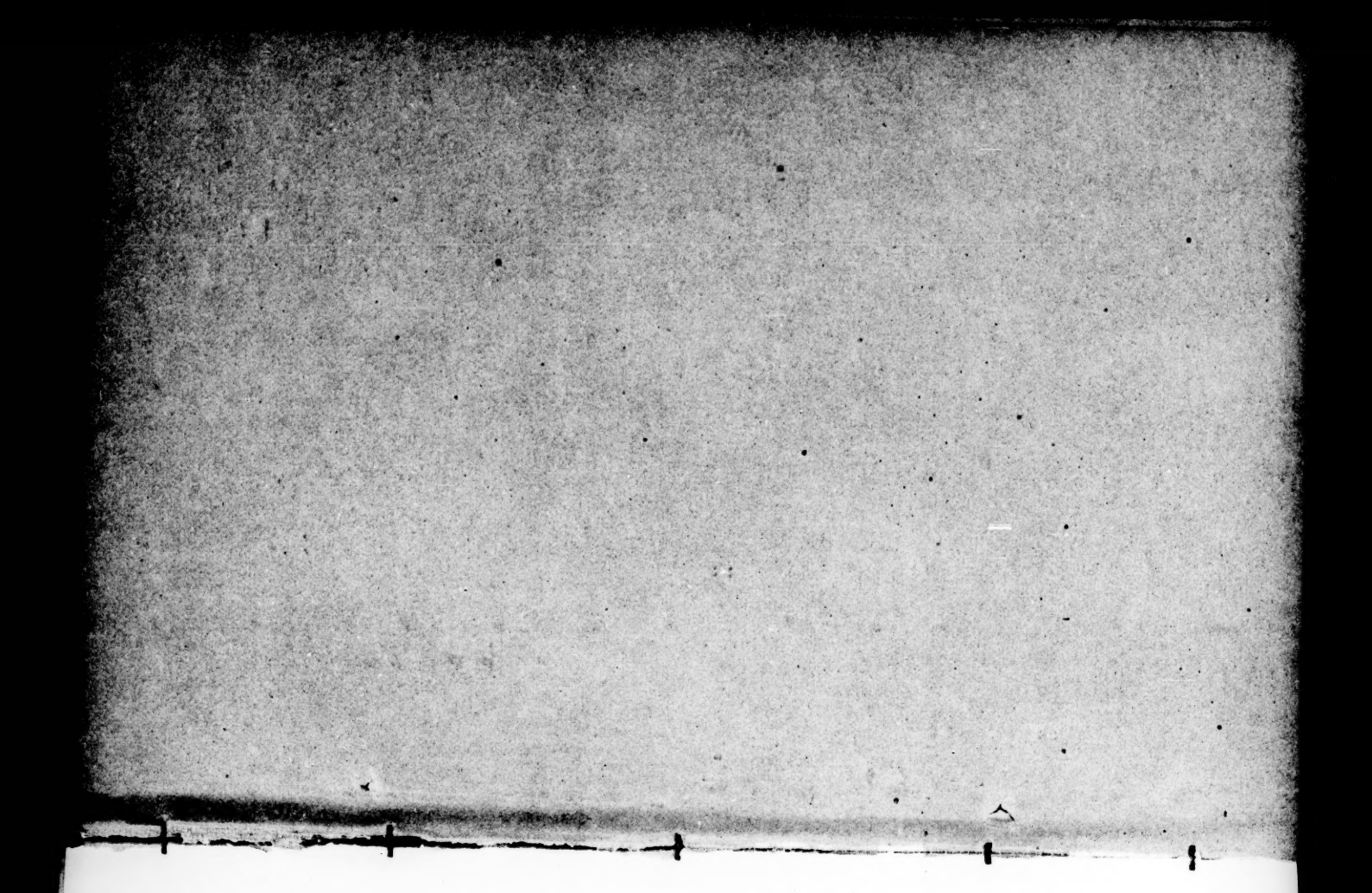
106 TERRITORY OF UTAH,
County of Salt Lake, ss:

I, Chas. A. Gould, clerk of the supreme court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct transcript of the records and proceedings now on file in my office in the foregoing entitled action.

In witness whereof I have set my hand and affixed the seal of said court this 6th day of July, A. D. 1876, at the clerk's office, in Salt Lake City.

[SEAL.] CHAS. A. GOULD, *Clerk.*
By H. A. GOULD, *Dep'ty Clerk.*

Clerk's fees, forty dollars. Rec'd paym't of plaintiffs, per hands of Z. Snow, their att'y.
July 23rd, 1876.

CHAS. A GOULD, *Clerk.*
By H. A. GOULD, *Dep'ty Clk.*

(Indorsement on cover:) No. 131. Mary G. Hussey, appellant, vs. Job Smith. Utah Terr'y sup court. Filed 3 August, 1876.